STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

April 7, 1995

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: MFS Petition Regarding Unbundling
of Local Exchange Carrier
Common Line Facilities RM - 8614

Dear Secretary Caton:

Enclosed please find an original and nine copies of the Comments In Opposition To Request For Rulemaking of the New York State Department of Public Service in the above captioned proceeding.

Respectfully submitted,

Penny

Penny Rubin
Assistant Counsel

cc: MFS Communications Company, Inc.

c:\pbr\mfs.cat

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
MFS Petition Regarding	)	
Unbundling of Local Exchange	)	RM - 8614
Carrier Common Line Facilities	)	

COMMENTS IN OPPOSITION TO
REQUEST FOR RULEMAKING

INTRODUCTION AND SUMMARY

On March 7, 1995 MFS Communications Company, Inc. (MFS) petitioned the Federal Communication Commission (Commission) to adopt rules requiring that Tier 1 Local Exchange Carriers (except NECA pool members) unbundle the local loop at cost based rates, in states that have certified local exchange competition.

New York is firmly committed to encouraging competition in the telecommunications industry and continues to take a leadership role in creating opportunities for new entrants, such as MFS, to enter the local exchange market. We believe that a federal-state partnership will serve to increase opportunities for new players and bring about lower prices and greater choice for consumers.

We are concerned, however, that the approach proposed by MFS will, in fact, delay the further development of competition in states that have already acted and will do little

to advance competition in areas where it has not yet developed. This proposal, if adopted, would penalize states that have taken major steps forward in promoting local competition and would reinforce the inaction of states that are questioning the wisdom of adopting procompetitive policies.

The New York State Department of Public Service (NYDPS), therefore, opposes the MFS Petition for Rulemaking on the grounds that the Commission's jurisdiction does not extend to requiring the unbundling of local loop facilities and to establishing technical interconnection standards for the purpose of promoting local exchange competition.

Instead, the Commission could make a valuable contribution by establishing a process which results in the adoption of non-binding voluntary guidelines for technical interconnection and local loop unbundling, as MFS has proposed regarding the pricing of the unbundled elements.[1/] States that have yet to address local exchange competition could rely on the Commission's expertise if they choose. It may also be useful for competitors such as MFS to consider working with NARUC to develop a framework for local loop unbundling. In any event, New York cannot support the Petition as it is framed and respectfully requests that Commission refrain from establishing a rulemaking on mandatory local loop unbundling and interconnection standards.

[1/] We do, however, have concerns regarding the pricing methodology proposed by MFS, as discussed below.

I. The Commission Does Not Have the Authority to Require Local Loop Unbundling and the Adoption of Uniform Technical Standards For Interconnection.

MFS would have the Commission require that the local loop be unbundled and that the Commission adopt uniform technical standards for interconnection to the unbundled loop facilities (MFS Petition at 1, 30).

The premise underlying the Petition is that the growth of competition in the local exchange market will be made possible by the availability of unbundled loops (Petition at 15). According to MFS, "development of competition will mean that business and residential customers finally will have a choice of local service providers just as they have a choice of long distance and CPE providers" (Petition at 16). Moreover, MFS claims that the Commission has the requisite jurisdiction to set interconnection and unbundling rules, and effectively preempt the states, because the local loop inherently carries both interstate and intrastate communications as a single inseparable physical facility, and the local network is used to terminate intrastate and interstate communications.

In effect, MFS is asking the Commission to preempt state authority over local service, and to do so only in states that are moving ahead. While New York has a long tradition of encouraging local exchange competition, we have done so in a manner that balances the interests of local competitors, the incumbents and local ratepayers. MFS is correct that local exchange competition will give consumers the types of choices

they have regarding long distance service and CPE. However, it is one thing to suggest this should happen, and it is quite another matter for MFS to contend the Commission has jurisdiction over loop unbundling and interconnection for the purpose of facilitating local exchange service.

First, all communications facilities such as the local loop, with minor exceptions, are used to provide intrastate and interstate services. MFS' argument that the Commission has jurisdiction because the local loop facilities are used for both intrastate and interstate purposes proves too much. MFS' justification would effectively remove state authority over intrastate facilities, even if the purpose for using these facilities is to encourage competition for local service. Further, the Courts have consistently rejected this notion "that whenever facilities are physically inseparable, the Commission may preempt state regulation of these facilities. NARUC v. F.C.C., 880 F.2d 422, 428, D.C. Cir. (1989); see also, Louisiana v. F.C.C. 476 U.S. 375, Public Utilities Comm'n of Texas v. F.C.C. 886 F.2d 1332.

Second, as we have argued in numerous proceedings, the Commission may not disregard the intent of Congress in enacting Section 152(b) of the Communications Act. Section 152(b)(1) clearly preserves the states' jurisdiction over services, charges, facilities and practices "for or in connection with intrastate communications services." 47 U.S.C. §152(b); Louisiana v. FCC, 476 U.S. 355, 373-374 (1986). Since the Commission's

jurisdiction extends only to "interstate and foreign communications" (47 U.S.C. 152(a)), it may not do as MFS proposes... set policy for communications which are solely intrastate.

Third, even if MFS could establish that local loop unbundling and interconnection would further its competitive agenda, the Supreme Court in Louisiana enunciated three reasons why the Commission's authority over interstate and foreign communications under Section 151 is not sufficient to allow it to preempt the states. First, the Court made clear that policies derived under Section 151 cannot form a basis for preempting areas reserved to the states by Section 152(b) because Section 152(b) represents a congressional denial of power [476 U.S. at 371-374]; second, the FCC cannot expand its power in the face of Section 152(b) [Id. at 375]; and third, the division of authority set forth in Section 152(b) applies notwithstanding that state regulation of the areas reserved to the states may frustrate an FCC goal conceived under Section 151 [Id. at 374-376].

Moreover, MFS' reliance on the physical interconnection cases is inappropriate in this instance (North Carolina Utility Commission v. F.C.C., 537 F.2d 787 (4th Cir. 1976), cert.den., 429 U.S. 1027 (1976) (NCUC I), Puerto Rico Telephone, Co. v. F.C.C., 553 F.2d 694 (1st Cir. 1977) and Public Utility Comm'n of Texas v. F.C.C., 886 F.2d 1325 (D.C. Cir. 1989). In those cases the issue was connection of customer provided equipment (telephones, private based exchanges, and a microwave system) to

the national telephone network. It was not possible to separate the intrastate and interstate components of such regulations. See Louisiana v. F.C.C. 476 U.S. at 375. It was thus an impossibility which rested on unique and specific circumstance associated with connection to the network. No such impossibility is presented here. The issue here concerns the development of local competition, not how and whether customers will have access to the interstate network.

Despite the limitation on the Commission's jurisdiction, it could make non-binding recommendations on interconnection and unbundling standards which states could consider. In this fashion, the Commission can use its expertise to assist interested states but at the same time avoid an unnecessary jurisdictional dispute.

II. Non-Binding Voluntary Pricing Guidelines Must Be Carefully Constructed

The Petition recommends that the Commission establish voluntary "non-binding" pricing guidelines for unbundling loops. The guidelines would prohibit anti-competitive price squeezes by requiring unbundled loop rates to be consistent with retail rates for bundled exchange access services. Local Exchange Carriers (LECs) that voluntarily comply would receive additional pricing flexibility for pricing exchange access. The guidelines are envisioned as helpful to states by relieving them of the administrative burden of developing their own pricing standards.

MFS makes reasonable arguments regarding the need for an imputation standard and the benefits of extending price flexibility to LECs when entry barriers are reduced and competition results. States addressing local exchange competition have generally concurred, and those without the resources to examine the issues in detail may benefit from such guidelines. However, we have some concerns about the methodology proposed by MFS.

MFS would have the Commission balance the ratios between the rates and "total service" incremental costs for bundled and unbundled facilities respectively. New York has not yet found "total service" incremental cost measures that are valid for pricing, in part because such studies assume all inputs are variable and this assumption is exceedingly difficult to work with. Therefore, we think this may be even more difficult for the Commission since it very rarely relies on incremental costs (see, 47 CFR Parts 61 & 69).

The proposal to provide LECs additional pricing flexibility may be reasonable but because the Commission has limited jurisdiction over local loop prices, even if it did have the authority to require local loop unbundling (which it does not), the impact would be minor. As the LECs know, the kind of change MFS seeks must be implemented at the state level. Moreover, the unprecedented proposal for the creation of a new pricing basket that would include both intrastate and interstate loop prices underscores this deficiency, and raises serious

jurisdictional issues. Thus, the pricing issues MFS raises are clearly better addressed by the states but voluntary guidelines could be beneficial for states which lack the resources.

Conclusion

New York continues to be committed to encouraging local exchange competition. We recognize that some states may not have the resources to adequately develop the framework for local competition and therefore the Commission could play a valuable role in those instances. However, the Commission must refrain from establishing a rulemaking, as proposed by MFS, since to do so would result in an unnecessary jurisdictional dispute. Finally, we caution that MFS' pricing proposal has not been adopted in New York and should be examined carefully before it is proposed as a federal model.

Respectfully submitted,

Maureen O Helmer

MAUREEN HELMER
General Counsel
State of New York
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Penny Rubin
Of Counsel

Dated: April 5, 1995
Albany, New York

cc: MFS Communications Company, Inc.

James Lanni
Rhode Island Division
of Public Utilities
100 Orange Street
Providence RI 02903

Joel B. Shifman
Maine Public Utility Commission
State House Station 18
Augusta ME 04865

Charles F. Larken
Vermont Department of
Public Service
120 State Street
Montpelier VT 05602

Rita Barmen
Vermont Public Service Board
89 Main Street
Montpelier VT 05602

Keikki Leesment
New Jersey Board of
Public Utilities
2 Gateway Center
Newark NJ 07102

Eileen E. Huggard, Esq.
NYC Department of Energy and
Telecommunications
75 Park Place, 6th Floor
New York NY 10007

Veronica A. Smith
Deputy Chief Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Mary J. Sisak
District of Columbia
Public Service Commission
Suite 800
450 Fifth Street
Washington DC 20001

Telecommunications Report
1333 H Street, N.W. - 11th Floor
West Tower
Washington DC 20005

Judith St. Ledger-Roty
Pierson, Ball & Dowd
1200 18th Street, NW
Washington DC 20036

International Transcription
Services, Inc.
2100 M Street, NW
Suite 140
Washington DC 20037

Brad Ramsay
NARUC
Interstate Commerce
Commission Bldg., Room 1102
12th & Constitution St., NW
Washington DC 20044

William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Camille Stonehill
State Telephone Regulation
Report
1101 King Street
Suite 444
Alexandria VA 22314

Greg Krasovsky
Associate General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee FL 32301

Alabama Public Service
Commission
1 Court Square
Suite 117
Montgomery AL 36104

Archie R. Hickerson
Tennessee Public Service
Commission
460 James Robertson Pky.
Nashville TN 37219

Sandy Ibaugh
Indiana Utility
Regulatory Commission
901 State Office Bldg.
Indianapolis IN 46204

Ronald Choura
Michigan Public
Service Commission
6545 Mercantile Way
Lansing MI 48910

Mary Street
Iowa Utilities Board
Lucas Building
5th Floor
Des Moines IA 50316

Gary Evenson
Wisconsin Public
Service Commission
P.O. Box 7854
Madison WI 53707

Jon D. Loe
Minnesota Public Utilities
Commission
121 Seventh Place East
Suite 200
Saint Paul MN 55101-2147

Gordon L. Persinger
Missouri Public Service
Commission
P.O. Box 360
Jefferson City MO 65102

Sam Loudenslager
Arkansas Public Service
Commission
1200 Center Street
P.O. Box C-400
Little Rock AR 72203

Jane P. Olsen
Sr. Assistant General
Counsel
Oklahoma Corp. Commission
400 Jim Thorpe Building
Oklahoma City OK 73105

Marsha H. Smith
Idaho Public Utilities
Commission
Statehouse
Boise ID 83720

Ellen Levine
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco CA 94102

Edward Morrison
Oregon Public Utilities
Commission
Labor and Industries Bldg.
Room 330
Salem OR 97310

Ernest Heller
Washington U&TC
1300 S. Evergreen Park
Drive S.W.
Olympia WA 98504

MEB:ay:FCC-COMP.LST